

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





77-2095

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

ORIGINAL

-----X

LOUISE TODARO, ERNESTINE DAVIS, DEIDRA  
PLAIR, PHYLLIS KLIPPEL, SYLVIA DAVIS,  
CLEO BACON, IRIS CAPELLELLA, NAOMI  
BOSTICK, MARY REED, ALICE TAVER, CAROL  
LEWIN, TAMMY GOLDSTON, MARGARET GATLING,  
TONYA JACKSON, TRACYE CRAIG, BEVERLY MASSEY,  
CARMEN GARCIA, HELEN LAVORE, GLORIA TAGGART,  
MARTA HARDEE, ALTHEA MCDANIEL, RUTH DOBSON,  
MADELINE PINEDA, JUDY WHEAT, BERNADETTE  
BROWN, and EVELYN THORPE, on behalf of  
themselves and all other persons similarly  
situated,

Plaintiffs-Appellees,

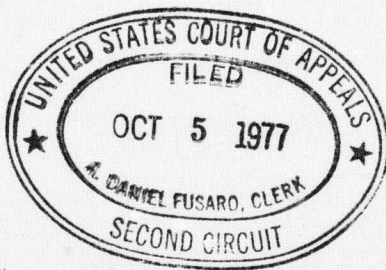
-against-

BENJAMIN WARD, Commissioner of the New York  
State Department of Correctional Services;  
IAN LOUDON, Assistant Commissioner for Health  
Services of the New York State Department of  
Correctional Services; DAVID FROST, Southern  
Regional Director of Health Services of the  
New York State Department of Correctional  
Services; FRANCES CLEMENT, Superintendent of  
Bedford Hills Correctional Facility; HENRY  
WILLIAMS, Health Services Director of  
Bedford Hills Correctional Facility; ROBERT  
TSCHORN, Surgical Consultant at Bedford  
Hills Correctional Facility; and MARIE DALY,  
Nurse Administrator at Bedford Hills Cor-  
rectional Facility, individually and in  
their official capacities,

Defendants-Appellants.

-----X

APPELLANTS' REPLY BRIEF



SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

ARLENE R. SILVERMAN  
Assistant Attorney General  
Of Counsel

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants-Appellants  
Two World Trade Center  
New York, New York 10047  
Tel. No. (212) 488-7657

TABLE OF CONTENTS

---

|                                                                                                                                                                             | <u>Page</u> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| ARGUMENT - APPELLEES' BRIEF IS AN UN-SUCCESSFUL ATTEMPT TO EXPAND THE FINDINGS OF THE DISTRICT COURT TO SUPPORT THE BROAD AND SWEEPING JUDGMENT ENTERED IN THIS ACTION..... | 2           |
| A. The Testimony of Appellees' Experts was of No Value.....                                                                                                                 | 3           |
| B. The Size of the Medical Staff Preceded the Initiation of this Lawsuit.....                                                                                               | 7           |
| C. Appellees' Brief Fails to Show that the Judgment Is Supported By the Record and Not Overbroad.....                                                                       | 11          |
| Conclusion.....                                                                                                                                                             | 20          |



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

LOUISE TODARO, ERNESTINE DAVIS, DEIDRA :  
PLAIR, PHYLLIS KLIPPEL, SYLVIA DAVIS, :  
CLEO BACON, IRIS CAPELLELLA, NAOMI :  
BOSTICK, MARY REED, ALICE TAVER, CAROL :  
LEWIN, TAITTY GOLDSTON, MARGARET GATLING, :  
TONYA JACKSON, TRACYE CRAIG, BEVERLY MASSEY, :  
CARMEN GARCIA, HELEN LAVORE, GLORIA TAGGART, :  
MARTA HARDEE, ALTHEA MCDANIEL, RUTH DOBSON, :  
MADELINE PINEDA, JUDY WHEAT, BERNADETTE :  
BROWN, and EVELYN THORPE, on behalf of :  
themselves and all other persons similarly :  
situated, :

Plaintiffs-Appellees, :

Docket No.  
77-2095

-against- :

BENJAMIN WARD, Commissioner of the New York :  
State Department of Correctional Services; :  
IAN LOUDON, Assistant Commissioner for Health :  
Services of the New York State Department of :  
Correctional Services; DAVID FROST, Southern :  
Regional Director of Health Services of the :  
New York State Department of Correctional :  
Services; FRANCES CLEMENT, Superintendent of :  
Bedford Hills Correctional Facility; HENRY :  
WILLIAMS, Health Services Director of :  
Bedford Hills Correctional Facility; ROBERT :  
TSCHORN, Surgical Consultant at Bedford :  
Hills Correctional Facility; and MARIE DALY, :  
Nurse Administrator at Bedford Hills Cor- :  
rectional Facility, individually and in :  
their official capacities, :

Defendants-Appellants. :

-----X

APPELLANTS' REPLY BRIEF

### ARGUMENT

APPELLEES' BRIEF IS AN UNSUCCESSFUL ATTEMPT TO EXPAND THE FINDINGS OF THE DISTRICT COURT TO SUPPORT THE BROAD AND SWEEPING JUDGMENT ENTERED IN THIS ACTION.

Appellees' attempt to expand the findings of the District Court in an effort to justify that Court's holding that certain aspects of the delivery of medical care at the Bedford Hills Correctional Facility are constitutionally inadequate. Appellees thus implicitly recognize that the findings of the District Court are sparse and ill support the Court's broad and sweeping judgment in this action. Appellees recite throughout their brief the evidence they presented to the District Court of alleged denials of necessary medical care, and without authority state that this evidence was relied on by the District Court in support of its opinion (Brief, p. 20).\*

They quote extensively from their alleged

---

\* Although the District Court stated that it was not discussing all instances of denied access to a physician, the Court's lack of even a passing reference to other examples of denied or delayed care renders its findings insufficient to sustain its judgment, particularly where the Court has also stated that not all of appellees' contentions were borne out by the evidence (A-20).



expert witnesses and rely in great part on appellees' Exhibit 67, a biased summary of one of their expert's testimony, Dr. Joan Waitkeviza, although appellees purport to present it as an objective summary of the medical charts put into evidence. In point of fact Judge Ward rejected many aspects of appellees' claim that medical treatment was denied or delayed stating that appellees' contentions "in a number of instances" are not substantiated by the record (A. 20).

A. The Testimony Of Appellees' Experts Was Of No Value

To bolster the findings of the District Court, appellees' quote extensively from the testimony of Dr. Richard Della Penna, Dr. Jonathan Weisbuch, Dr. Patricia Nolan, Dr. H. Joan Waitkevicz and Lauel Rans. However, the testimony of these individuals were very general and of little value.

Although Dr. Nolan testified that certain procedures for delivery of medical care at Bedford Hills were inadequate, she failed to state what institutions she ever surveyed were, in fact, adequate in her opinion, and appellees produced absolutely no data with respect to any audits her department had done of any other institutions.

Similarly, although Dr. Della Penna testified as to the procedures at Rikers Island, appellees failed to adduce any audit which would have established that those procedures are, in fact, complied with. As for Dr. Weisbuch, he also indicated that certain procedures at Bedford Hills were inadequate but it appears that the institutions under his jurisdiction suffer from the same inadequacies since he only referred to them as "better than they were." On the basis of their testimony, the Court could not have concluded that the medical services rendered at Bedford Hills were substantially different from medical services rendered by any clinic in this country, and appellees completely failed to meet their burden of proving that the Bedford Hills medical program was constitutionally inadequate.

The testimony of appellees' experts suffered in other ways. Their main witness, Dr. H. Joan Waitkevicz, was an internist of only 5 years experience, who repeatedly gave testimony on many medical specialties beyond her admitted expertise and training. She had examined none of the



residents about whom she testified, yet while on the stand, steadfastly forged ahead, disputing and overruling the judgment of the medical practitioners who had examined the patients first hand, and she was, of course, unable to appreciate the subtleties that went into the judgments. Not surprisingly then, her testimony was replete with predictions of the most dire consequences from minor symptoms which subsequent developments never confirmed.\*

As for the testimony of Drs. Nolan, Weisbuch and Della Penna, in addition to being too general, it was of little value for the additional reason that they were barely aware of the practices and procedures as regards health care at the Bedford Hills Correctional Facility and were basing their testimony in great part on documents given to them by plaintiffs' counsel.

They repeatedly stated that nurse screening could not take place in a lobby clinic through a cage-like door, and

---

\*Dr. Waitkevicz prepared an alleged summary for this Court of the medical records of various plaintiffs. However, as the medical records confirm, there were serious omissions on Exhibit "67" and rather than being a summary, it was selective and designed to promote her point of view.

judged the adequacy of nurse screening at Bedford Hills on the assumption that this is the procedure there.

As appellants repeatedly testified, this is not the procedure at Bedford Hills. Nurse screening takes place inside the lobby satellite clinic and, on occasion, is continued in the main ambulatory care facility. These experts also failed to take into account that Bedford Hills is a receiving institution and that inmates coming to Bedford Hills have been processed elsewhere and have had the benefits of other medical intake programs.

The testimony of Laurel Rans supported the position of the appellants more than the appellees, since the medical program at her institution was virtually nonexistent compared to the complex program at Bedford Hills.

Finally, appellees' experts repeatedly failed to take into consideration that successful and appropriate treatment depends on the cooperation of the patient, frequently lacking in the Bedford Hills inmate. When Dr. Williams arrived at Bedford Hills in the fall of 1974, he



met with the inmate liaison committee on several occasions to make clear to the residents the importance of laboratory tests, X-rays, and attendance at the clinic (1511-1512). He revised procedures of notifying the residents when they were to report to the clinic. Yet, the residents regularly failed to come to the clinic for scheduled physician appointments, X-rays and laboratory tests.

B. The Size of the Medical Staff Preceded the Initiation of This Lawsuit.

Appellees' brief also attempt to present the initiation of their lawsuit as the catalyst leading to changes in the medical program at Bedford Hills by the time of the trial in the District Court. This is completely unjustified and Judge Ward made no such finding. The record makes clear that the staffing pattern at Bedford Hills preceded this lawsuit and was established by the Department of Correctional Services through its Assistant Commissioner for Medical Services, Dr. Ian Loudon, as part of the Department's goal to constantly upgrade and improve medical services at the various correctional facilities throughout



the state (1290).\* In fact, Dr. Loudon specifically commissioned an audit by the Joint Commission on Accreditation of Hospitals (JCAH) in order to obtain their recommendations and make, among other things, medical staff changes at Bedford Hills. Although their standards were not exactly appropriate for an ambulatory care facility (1297).\*\* Pursuant to the suggestions of the JCAH, report dated October 18, 1973 (Exh. "127") a part time pharmacist was hired for Bedford Hills, the nursing staff was expanded and additional physician hours were added.

In October, 1974, when this lawsuit was instituted the regular medical staff at Bedford Hills consisted of Dr. Williams, Dr. Saadat and Dr. Zorka Bekerus who did general practice at the institution 5 days a week, approximately three

---

\* In furtherance of this goal, the Department is developing a Policies, Procedures and Guidelines Manual which contains among other things, protocols for the treatment of tuberculosis and syphilis (Exhibit "DD", 1290, 1294).

\*\*Dr. Frost also testified that the problem oriented medical record will be used shortly at Bedford Hills in conjunction with the University of Rochester (1299).



hours a day (Exhibit "76d"). This was virtually the identical staffing at Bedford Hills in January, 1976, when this case went to trial, with the exception of three additional hours provided by Dr. Enders on Saturdays beginning in December, 1974 (Exhibit "76d"). Dr. Bekerus, who replaced Dr. Tschorn, has simply been replaced by three other physicians, Dr. Poon, Dr. Ogwo and Dr. David.\* Dr. Della Penna, appellees' own expert, testified that physician staffing at Bedford Hills was adequate (659).

\*Even prior to October, 1974, Bedford Hills was staffed by a Facility Health Services Director, or his equivalent and another physician, Dr. Tschorn who attended the facility every day for one and a half to two hours (1434). Dr. Kones was the Facilities Health Director at Bedford Hills for one year, preceding Dr. Williams. Dr. Kones spent from two to four hours at the facility, five days a week (1433). He resigned in June, 1974. Prior to Dr. Kones, Dr. Leonard Schoenberger was the Facility Services Director. Between Dr. Kones' resignation and Dr. Williams' appointment, Dr. Enders, currently working at the facility, and Dr. Yu substituted for the Facility Health Services Director (1301). Similarly, when Dr. Williams was ill in April, 1975, Dr. Ogwo, now working on a fee for services basis at the facility, filled in for him (1305).



Similarly by September, 1974, over one month before this lawsuit was initiated, there were nine full time nurse items at Bedford Hills, two items having been detailed from the Taconic Correctional Facility (1423).

Moreover, in their attempt to bolster the decision below, appellees imply in this Court that the Department of Correctional Services intentionally stopped paying outside specialists, as well as Dr. Tschorn, in the fall of 1974 in order to deprive the residents of Bedford Hills of their services. In fact, as Dr. Frost explained, during this period the Department of Audit and Control required the Department of Correctional Services to adhere to the medicaid fee schedule. Dr. Tschorn as well as some other specialists refused to accept these rates; however, they were replaced by qualified individuals who were willing to do so. In fact, the specialists holding clinics at the Institution have currently been extended to include a neurologist (1301-1303, 832).



C. Appellees' Brief Fails to Show that the Judgment Is Supported By The Record and Not Overbroad.

A new X-ray machine is currently in use at Bedford Hills. Appellees' brief nonetheless dwells at length on the alleged inadequacy of the prior X-ray machine used at Bedford Hills. Appellants dispute so much of the opinion and judgment that states or implies that, under the limited circumstances of its use, the X-ray machine previously used at Bedford Hills was inadequate or potentially dangerous.\* Appellees and the Court magnify the problems of the previous machine which was generally used to take only one chest X-ray each year on a resident (1436-1437).

In discussing the sick call/physician referral procedures at Bedford Hills, the appellees' brief recites that the District Court held that women are frequently not seen by doctors for two weeks to two months (emphasis supplied) (Brief, p. 11) when in fact the Court made no such finding. They erroneously state that there is no medical equipment at the lobby clinic except the supplies which the nurse carries

---

\* Part I of the declaratory portion and Parts I(A) and (B) of the injunctive portion of the Judgment.



with her which is equally untrue. There are storage cabinets at the lobby clinic filled with various supplies for treating complaints made at the clinic.

As for their attack on the standing orders used for nurse screening approved by Dr. Williams, the Court made no finding that appellants' orders were inadequate and further stated that appellants and appellees agreed on the minimal diagnostic procedures for adequate screening. Yet the Court unwarrantedly ordered that the Facility Health Service Director set forth new written protocols defining the evaluation procedures to be followed at screening and the treatment which the screening staff members may supply. Although appellants never challenged the ability of a registered nurse to do screening, the District Court judgment, in addition to mandating new standing orders, requires that registered nurses employed at Bedford Hills be trained in the techniques of triage and screening at State expense. There was never any evidence to support this requirement which was not even fairly raised as an issue at trial. It was simply invented by appellees in appellees' proposed judgment and included in the final judgment of the Court.



The lobby clinic as operated at Bedford Hills was appropriate to screen the women for physician appointments. After medications were given out, those in need of examination were called individually into the lobby clinic room or to the ambulatory care facility. The standing orders used by the nurses were adapted to the screening procedures followed at Bedford Hills. At the lobby clinic, the nurse could question the inmate as to her history - if she was a hypertensive, had asthma, etc. Individual health records were available at the ambulatory care facility. The nurse could check the chart when she returned to this clinic, if necessary, or call the inmate down to the clinic for a further examination.

Amazingly, the District Court points out that the health care administrators did not view the lobby clinic in operation to assess its efficiency. Yet Judge Ward, who never visited the clinic, was willing to conclude third hand that the clinic was inadequate based on the second hand testimony of appellees' experts who had never seen the clinic in operation either.

Appellees brief also discusses the medical health records of various inmates not mentioned in the District Court opinion to improve the bases of the Court's holding. However, their analysis fails to do so. For example, Evelyn Mann, who complained of breast swelling on September 14, 1975, was seen by Dr. Saadat, the gynecologist, on September 19, 1975. The nurse apparently determined that it was unnecessary to call her down for further screening at the ambulatory care facility and arranged a physician's appointment instead.

As for Iris Cappella, Dr. Williams saw her on February 5, 1975 and she did not mention any pains from the loop (Brief, p. 20-21). Moreover, cramping and bleeding are a normal phenomena with an IUD (T. 1560-1561).

Candida Rivera claimed she was hit on the head with a baseball bat. However, she did not complain to a nurse until three days later. As Dr. Williams pointed out, this was no longer an emergency situation since by this time, the nurse could ascertain if the patient were conscious and alert (1694). The nurse's judgment was confirmed since



a radiographic examination of fracture or other defect of the bony calvarium (Northern Westchester Hospital Center - Radiology Report).

As for Ms. Dobson, Dr. Williams testified that on April 20, 1975, Nurse Johnson found no nodules on the left breast. On May 3, 1975, she saw Dr. Enders and had no breast complaint. She saw Dr. Elders again on May 10, May 24, and May 31, 1975 and had no breast complaint. On June 5, 1975, Dr. Williams did her physical examination. She made no comment about her breast at that time which checked out normal (1578-1581).

Ms. Bacon was seen by Dr. Tschorn on November 12, 1973. The note is in his handwriting and recites her weight and blood pressure. This could hardly have been done if he did not personally see her. Dr. Williams testified that a gynecologist does not have to handle a spontaneous miscarriage (1586). Insofar as appellees claim that an internal was not done, there is nothing in the record to indicate that such an examination was not done and appellees, here, are trying to second-guess the judgment of the physician who was present, examined and spoke to Ms. Bacon.

Paulette Blackstock never had any tissue growth and merely needed sunglasses. (Report of Dr. Haggadus Sept. 4, 1975). As for Louise Johnson, she was sent to Grasslands Eye Clinic on February 10, 1975. Her eye required no treatment. (Grasslands Hospital Inter Agency Referral Sheet Dated 2/19/75 and 2/10/75 [lower half]).

On November 18, 1975, Dr. Haggadus found that Ms. Hapeman's interocular pressure was normal and that her vision was 20/20 (1547-1558). Rosemary Cutshaw, about whom Dr. Waitkevicz predicted the most dire results in April, 1975, had a thorough examination at Grasslands Medical Center. She had nothing more than acute gastritis and sinus bradycardia and the clinic simply prescribed mylanta and tylenol, available without prescription at any local drug store (Report from Grasslands, 6/4/75).

The Court invaded the province of the medical department in prescribing procedures for sick call at Bedford Hills. The Court gave the appellants two alternatives - to dispense with screening altogether and schedule inmates for a physicians' appointment within a day of their request or to conform to the screening procedure the Court set forth in Part II (B) of the Judgment.\*

\*Appellants misleadingly cite Dr. Williams and Dr. Frost for the proposition that inmates who insist on seeing a doctor should be permitted to do so. The policy at Bedford Hills is to make such an appointment, but at the convenience of the medical staff (1316).



As for the first alternative the Court was well aware that this requirement was impossible to meet. By such requirements, appellants were being exposed to the risk of being in contempt of Court since as the Court itself recognized throughout its opinion, the staffing at Bedford Hills would not permit such a scheme. As for the alternative procedure, more staffing would be required to comply with the requirements set forth in the judgment, and appellees should have taken their claims to the State Legislature which is the only body that can expand the nursing staff at Bedford Hills.

Appellees also discuss the medical records of various inmates not discussed by the District Court in relation to follow-up care. However, an examination of these additional medical records, again, does not support their claims. For example, Gloria Franklin, in fact, had a urine culture on December 11, 1974. It was negative. As was explained to the District Court, regular blood pressure readings on hypertension cannot always be done, given the staffing at Bedford Hills. However, the District Court apparently feels the staff should nonetheless be used for filling in physician and laboratory appointment slips and reporting normal laboratory tests, elective procedures.

Moreover, appellees discussion ignores the fact that an abnormal laboratory test is a clinic judgment.\* A test outside a laboratory range may be perfectly normal for a given individual. For example, Helen LaVore's syphilis test showed a titre of two and a titre of one, low level readings. She was 35 or 38 years old at the time and had she been treated for syphilis, it would have been years prior. Dr. Frost was not prepared to second guess the physician who treated her as to whether any treatment was necessary. Her test of February 3, 1976 (Exh. LL) was negative (1936). As for appellees' discussion of Judy Wheat, she had a negative test reported on August 14, 1974 (non-reactive) and there was no need to do an FTA test and narrow the field further (1335).

Insofar as appellees dwell at length on incidents in sick wing related by inmates to support their claims that needed medical help is denied those in sick wing, suffice it to say that the inmates who testified are not professionals and

---

\*Dr. Williams testified that even the less significant tests outside the laboratory range are reviewed three times a week (1680).



are not in a position to assess the need for medical treatment. Significantly, not one of their claims was documented by references to any medical health record.\*

In conclusion, the brief of appellees, like the opinion of the District Court fails to set forth serious illnesses that were treatable and went untreated for unconstitutional periods and falls back, instead, on forecasting calamities that in all the years of operation of the Bedford Hills Correctional Facility have never materialized.

---

\*With only a citation to their unsworn memorandum of law in the District Court, appellees unwarrantedly state in their brief that appellants wanted a light system installed in sick wing because they believed it would be easier to ignore. This statement directly conflicts with the District Court holding that appellants showed themselves to be truly concerned with the well being of the inmates they served (A-37).

CONCLUSION

THE JUDGMENT BELOW SHOULD  
BE REVERSED.

Dated: New York, New York  
October 3, 1977

Respectfully submitted,

LOUIS J. LETKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants-Appellants

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

ARLENE R. SILVERMAN  
Assistant Attorney General  
of Counsel



rec'd - 3 copies

10/3/71

4.00 P.M.

Ellen J. Winer